SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

No. 1598.

GEORGE S. KEY, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

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1 UNITED STATES OF AMERICA,
District of Maryland, to wit:

At a circuit court of the United States for the fourth circuit in and for the district of Maryland, begun and held at the court-house in the city of Baltimore, on the first Monday of November, being the fourth day of the same month, in the year of our Lord one thousand eight hundred and eighty-nine.

Present: The honorable Hugh L. Bond, circuit judge; Thomas J. Morris, judge Maryland district; Thomas G. Hayes, esquire, attorney; George H. Cairnes, esquire, marshal; James W. Chew, clerk.

Among other were the following proceedings, to wit:

THE UNITED STATES
vs.
GEORGE S. KEY.

Be it remembered that at a district court of the United States for the district of Maryland, begun and held on the first Tuesday of September, in the year of our Lord one thousand eight hundred and eighty-nine, John R. Kelso, jr., Ross T. Pennington, George F. Wise, James H. Downs, Thomas J. Tongue, Arthur R. Maclellan, George E. Shreck, William P. Towles, George F. Nichols, James T. Wagner, Robert Calder, Walter G. Smith, George Reir, Ernest H. Dryden, Willliam C. Spencer,
2 Randolph Teawalt, Alexander L. Bogge, jr., Harrison Scott, Albert Shriver, good and lawful men of the district aforesaid, who, being empannelled, sworn, and charged to inquire for the United States of America for the body of the district aforesaid, having withdrawn from the bar of the court, afterwards return and present to the said court an indictment in form following, to wit:

UNITED STATES OF AMERICA,
District of Maryland:

In the district court of the United States in and for the district of Maryland.

The grand inquest of the United States of America in and for the district of Maryland, inquiring for the body of said district, do on their oath present that George Singleton Key, late of said district, yeoman, heretofore on the 14th day of September, in the year eighteen hundred and eighty-nine, at Navassa Island, a place which then and there was under the sole and exclusive jurisdiction of the United States and out of the jurisdiction of any particular State or district of the United States, the same being, at the time of the committing of the offenses in the manner and form as hereinafter stated by the persons hereinafter named, an island situated in the Caribbean Sea and named Navassa Island and which was then and there recognized and considered by the United States as containing a deposit of guano within the meaning and terms of the laws of the United States relating to such islands, and which was then and there recognized and considered by the United States as appertaining to the United States
3 and which was also, then and there, in the possession of the United States under the laws of the United States, then and there, in force

relating to such islands, in and upon one James Mahon feloniously, wilfully, and of his malice aforethought did make an assault, and that the said George Singleton Key with a certain pistol which, then and there, was loaded with gunpowder and leaden bullets, and by him, the said George Singleton Key, had and held in his right hand, he the said George Singleton Key did, then and there, feloniously, wilfully, and of his malice aforethought shoot off and discharge at and upon the said James Mahon, thereby, and by thus striking the said James Mahon with the said leaden bullets, inflicting on and in the back of the body and in the face of him, the said James Mahon, two mortal wounds of which said mortal wounds, he, the said James Mahon, on the said 14th day of September, in the year of our Lord eighteen hundred and eighty-nine, at Navassa Island, aforesaid, died.

And so the grand inquest aforesaid, on their oath aforesaid, do say that the said George Singleton Key him, the said James Mahon, in manner and form aforesaid, and by the means aforesaid, feloniously, wilfully, and of his malice aforethought did kill and murder.

And the grand inquest aforesaid, on their oath aforesaid, do further present that Alfred Jones, otherwise called "Texas Shorty," Charles H. Smith, otherwise called John Ward, James H. Robinson, otherwise called "Snow," James Phillips, Edmund Francis, otherwise called "Blueball,"
James Johnson, otherwise called Thomas Welsh, Alfred Brown,
4 Moses Williams, otherwise called "Dakota," Edward Woodfork,
Edward Smith, otherwise called "Devil," Charles H. Davis, Stephen Peters, James Tasker, Norman Wooster, otherwise called "Juggler," Henry Jones, Cæsar Fisher, and Amos Lee, late of said district yeomen, on the day and year aforesaid, at the Navassa Island aforesaid, feloniously were present aiding, abetting, and assisting the said George Singleton Key the felony and murder aforesaid to do and commit.

And the grand inquest aforesaid, on their oath aforesaid, do further present that the said district of Maryland was the district of the United States into which the said Henry Jones, Caesar Fisher, George Singleton Key, Alfred Jones, otherwise called "Texas Shorty;" Charles H. Smith, otherwise called John Ward; James H. Robinson, otherwise called "Snow;" James Phillips, Edmund Francis, otherwise called "Blueball;" James Johnson, otherwise called Thomas Welsh; Alfred Brown, Moses Williams, otherwise called "Dakota;" Edward Woodfork, Edward Smith, otherwise called "Devil;" Charles H. Davis, Stephen Peters, James Tasker, Norman Wooster, otherwise called "Juggler," and Amos Lee, after committing the felony and murder aforesaid, in manner and form as aforesaid, at Navassa Island aforesaid, on the day and year aforesaid, were first brought from the said island of Navassa contrary to the statutes of the United States in such case made and provided, and against the peace, government, and dignity of the United States.

5 SECOND COUNT.

And the grand inquest aforesaid, on their oath aforesaid, do further present that George Singleton Key, late of said district, yeoman, heretofore on the 14th day of September, in the year of our Lord eighteen hundred and eighty-nine, at Navassa Island, a place which, then and there,

was under the sole and exclusive jurisdiction of the United States, and out of the jurisdiction of any particular State or district of the United States, the same being at the time of the committing of the offenses in the manner and form as hereinafter stated by the persons hereinafter named, an island situated in the Caribbean Sea and named Navassa Island, and which was, then and there, recognized and considered by the United States as containing a deposit of guano within the meaning and terms of the laws of the United States relating to such islands, and which was, then and there, recognized and considered by the United States as appertaining to the United States, and which was also, then and there, in the possession of the United States under the laws of the United States, then and there in force relating to such islands, in and upon one James Mahon, feloniously, wilfully, and of his malice aforethought did make an assault, and that the said George Singleton Key, with a certain pistol which, then and there, was loaded with gunpowder and leaden bullets and by him, the said George Singleton Key had and held in his right hand, he, the said George Singleton Key, did, then and there, feloniously, wilfully, and of his malice

6 aforethought shoot off and discharge at and upon the said James Mahon thereby, and by thus striking the said James Mahon with the said leaden bullets, inflicting on and in the back of the body and in the face of him, the said James Mahon, two mortal wounds, of which said mortal wounds he, the said James Mahon, on the said 14th day of September, in the year of our Lord eighteen hundred and eighty-nine, at Navassa Island, aforesaid, died.

And so the grand inquest aforesaid, on their oath aforesaid, do say that the said George Singleton Key him, the said James Mahon, in manner and form aforesaid, and by the means aforesaid, feloniously, wilfully, and of his malice aforethought, did kill and murder.

And the grand inquest aforesaid, on their oath aforesaid, do further present that the said district of Maryland was the district of the United States into which the said George Singleton Key, after committing the murder aforesaid in the manner and form aforesaid at Navassa Island aforesaid, was first brought from the said Navassa Island.

And the grand inquest aforesaid, on their oath aforesaid, do further present that Alfred Jones, otherwise called "Texas Shorty," Charles E. Smith, otherwise called John Ward, James H. Robinson, otherwise called "Snow," James Phillips, Edmund Francis, otherwise called "Bluehill," James Johnson, otherwise called Thomas Welsh, Alfred Brown, Moses Williams, otherwise called "Dakota," Edward Woodfork, Edward Smith, otherwise called "Devil," Henry Jones, Charles H. Davis, Stephen Peters, James Tasker, Norman Wooster, otherwise called "Juggler," Caesar Fisher, and Amos Lee, late of the said district, yeomen, before the

7 said felony and murder was committed by the said George Singleton Key, in the manner and form aforesaid, to wit, on the 14th day of September, in the year of our Lord eighteen hundred and eighty-nine, at Navassa Island, a place which, then and there, was under the sole and exclusive jurisdiction of the United States, and out of the jurisdiction of any particular State or district of the United States, the same being, at the time of the committing of the offenses in the manner and form as hereinafter stated by the persons hereinafter named, an island situated in the Caribbean Sea and named Navassa Island, and which was,

then and there, recognized and considered by the United States as containing a deposit of guano within the meaning and terms of the laws of the United States relating to such islands, and which was, then and there, recognized and considered by the United States as appertaining to the United States, and which was also, then and there, in the possession of the United States under the laws of the United States, then and there, in force relating to such islands, did feloniously, wilfully, knowingly, and maliciously aid, abet, cause, procure, command, and counsel the said George Singleton Key to do and commit the said felony and murder in manner and form aforesaid.

And the grand inquest aforesaid, on their oath aforesaid, do further present that the said district of Maryland was the district of the United States into which the said Alfred Jones, otherwise called "Texas Shorty," Charles H. Smith, otherwise called John Ward, James H. Robinson, otherwise called "Snow," James Philips, Edmund Francis, otherwise
8 called "Blueball," James Johnson, otherwise called Thomas Welsh, Alfred Brown, Moses Williams, otherwise called "Dakota," Edward Woodfork, Edward Smith, otherwise called "Devil," Henry Jones, Charles H. Davis, Stephen Peters, James Tasker, Norman Wooster, otherwise called "Juggler," Cæsar Fisher, and Amos Lee, after feloniously, wilfully, knowingly, and maliciously aiding, abetting, causing, procuring, commanding, and counselling the said George Singleton Key to do and commit the said felony and murder in manner and form aforesaid, at Navassa Island aforesaid, on the day and year aforesaid, were first brought from the said Navassa Island contrary to the statutes of the United States in such case made and provided, and against the peace, government, and dignity of the United States.

THOMAS G. HAYES,
Attorney of the United States for the District of Maryland.

Which said indictment is endorsed as follows: "Indictment; a true bill. John R. Kelso, jr., foreman."

Bench warrant.

THE UNITED STATES OF AMERICA,
District of Maryland, to wit:

To the marshal of the Maryland district, greeting:

We command you that you apprehend George Singleton Key, Alfred Jones, otherwise called "Texas Shorty," Charles H. Smith, otherwise called "John Ward," James H. Robinson, otherwise called "Snow,"
9 James Philips, Edmund Francis, otherwise called "Blueball," James Johnson, otherwise called "Thomas Welsh," Alfred Brown, Moses Williams, otherwise called "Dakota," Edward Woodfork, Edward Smith, otherwise called "Devil," Charles H. Davis, Stephen Peters, James Tasker, Norman Wooster, otherwise called "Juggler," Henry Jones, Cæsar Fisher, and Amos Lee, and them immediately have before the district court of the United States for the Maryland district, to answer unto an indictment for that they did, on the 14th day of September, A. D. 1889, at Navassa Island, in and upon one James Mahon, feloniously, wilfully, and of their malice aforethought, did make an assault, inflicting two mor-

tal wounds, of which said mortal wounds he died, and him, the said [illegible] Mahon, in manner and form aforesaid, and by the means aforesaid, [illegible] ously and of their malice aforethought, did kill and murder [illegible] the form of the statutes in such case made and provided, and against the peace, government, and dignity of the United States.

Hereof you are not to fail at your peril, and have you then and there this writ.

Witness the honorable Thomas J. Morris, judge of our said district court, this 14 day of November, in the year of our Lord eighteen hundred and eighty-nine.

Issue 14 day of November, 1889.

[SEAL.]

JAS. W. CHEW,
Clerk, District Court.

Marshal's return.

"Cepi omnes, Geo. H. Cairnes, U. S. marshal."

10 *Order remitting case to circuit court.—Filed November* 14, 1889.

THE UNITED STATES
vs.
GEORGE SINGLETON KEY
and others.

In the district court of the United States for the district of Maryland.—September term, 1889.

On motion of the attorney of the United States for the Maryland district—

It is by the court this 14th day of November, A. D. 1889, ordered, that the indictment and all the proceedings in this case be remitted to the circuit court of the United States for the fourth circuit in and for the Maryland district at a session to be held on the 15th day of November, A. D. 1889, in pursuance of the 1039 section of the Revised Statute, of the United States, and that this order be entered on the minutes of the court.

THOS. J. MORRIS,
District Judge.

Whereupon the said indictment, process, and proceedings of the said district are remitted to the circuit court here in pursuance of section 1039 of the Revised Statutes of the United States.

And thereupon the said George S. Key, Alfred Jones, otherwise
11 called "Texas Shorty," Charles H. Smith, otherwise called "John Ward," James H. Robinson, otherwise called "Snow," James Phillips, Edmund Francis, otherwise called "Blueball," James Johnson, otherwise called Thomas Welsh, Alfred Brown, Moses Williams, otherwise called "Dakota," Edward Woodfork, Edward Smith, otherwise called "Devil," Charles H. Davis, Stephen Peters, James Tucker, Norman Wooster, otherwise called "Juggler," Henry Jones, Charles Fisher, and Amos Lee come to the bar of the court here in their proper

persons, under the custody of the marshal af the said district, and by their counsel file in court here a demurrer to the said indictment, as follows, to wit:

Demurrer.—Filed November 15, 1889.

THE UNITED STATES
vs.
GEORGE S. KEY ET AL.

In the circuit court of the United States for the Maryland district.—Indictment No. 2.—November term, 1889.

The defendants, by their attorneys and counsel in their behalf, and as advised by counsel, say that the indictment aforesaid, in the cause aforesaid, against them exhibited, is bad in law, and they hereby demur thereto and say that by no matter or thing alleged therein are they in law obliged to plead to the same.

A. STIRLING,
ROBT. P. GRAHAM,
JAMES D. COTTER,
E. J. WARING,
J. EDWARD STIRLING,
Attorneys and Counsel for all the said Defendants.

12 Whereupon all and singular the premises being seen and by the court here fully understood, it is considered by the court here that the said indictment and the matters therein contained are sufficient in law to compel the said prisoners to answer thereto.

Arraignment and pleas.

And thereupon the said George S. Key, Alfred Jones, otherwise called "Texas Shorty," Charles H. Smith, otherwise called "John Ward," James H. Robinson, otherwise called "Snow," James Philips, Edmund Francis, otherwise called "Blueball," James Johnson, otherwise called Thomas Welsh, Alfred Brown, Moses Williams, otherwise called "Dakota," Edward Woodfork, Edward Smith, otherwise called "Devil," Charles H. Davis, Stephen Peters, James Tasker, Norman Wooster, otherwise called "Juggler," Henry Jones, Caesar Fisher, and Amos Lee, having had hearing of the said indictment, and forthwith being demanded of each of them concerning the premises in the said indictment above specified and charged upon them how they will acquit themselves thereof, they each and separately say that they are not guilty thereof, and thereof for good and evil they put themselves upon the country; and the said Thomas G. Hayes, esquire, attorney of the United States for the district aforesaid, who, in this behalf prosecuteth, doth the like.

Jury sworn.

13 Whereupon the panel of petit jurors selected, drawn, and returned to the court here in pursuance of the statute in such case made and provided, being called, come; whereupon certain of them,

to wit, Oliver P. Merryman, John B. Harald, John Van [illegible], Augustus Denny, James S. Beaver, J. William S. Jordan, [illegible], James H. Stone, Joseph Renshaw, jr., William McLean, [illegible] man, and John Meusbaw, are sworn to say the truth in the premises.

Verdict.

And the said jurors so being empannelled and sworn to say the truth in the premises, upon their oath do say that the said George S. Key is guilty of the murder aforesaid, in both of the counts in the indictment above charged and imposed upon him, and that the said Moses Williams, otherwise called "Dakota," is not guilty of the murder aforesaid in both of the counts in the said indictment above charged and imposed upon him.

And as to the other prisoners above charged with the murder aforesaid, the said jurors, so empannelled and sworn as aforesaid, being unable to agree upon a verdict, are by the court here discharged from further consideration of the premises.

Motion for new trial and in arrest of judgment.—Filed December 4th, 1889.

THE UNITED STATES
vs.
GEORGE SINGLETON KEY
and others.
} For the murder of James Mahon.

In the circuit court of the United States for the fourth circuit and Maryland district.

14 The defendant, George Singleton Key, by his attorneys and counsellors, moves the court for a new trial and in arrest of judgment upon the verdict of murder rendered against him, the said defendant in the above-entitled cause, for the reasons following:

1st. Because the verdict is against the evidence and the weight of the evidence.

2nd. Because the court erred in their instructions to the jury.

3rd. Because the court erred in not admitting the following evidence offered by the defendant: The proof that on the —— day of April, 1889, a day after the 20th of April, 1889, a cargo of phosphate of lime was sold by the Navassa Phosphate Co., the persons in possession of said Navassa Island, and was taken from and loaded and shipped at and from said island, and in a British vessel, for the use of persons not citizens of the United States, nor resident therein, said phosphate of lime being the only product of said island, and the substance called guano by the alleged discoverer in his application under the act of August 18th, 1856.

4th. Because the indictment is defective in this, that is alleges that said Navassa Island was then and there recognized and considered by the United States as containing a deposit of guano within the meaning and terms of the laws of the United States relating to such islands, in-

stead of alleging that the said island was a rock, island, or key,
15 containing a deposit of guano or which had contained a deposit of guano.

In fact, said island never at any time did contain a deposit of guano, which was proved on the trial of the cause.

5th. Because the act of August 18th, 1856, chapter 164, now codified with amendments as Title 72 of the Revised Statutes of the United States, is unconstitutional and void, and the court was without jurisdiction to try the defendant under the indictment found against him.

6th. Because it was proved on the trial of the case that the substance mined and sold by the Navassa Phosphate Co. was a mineral phosphate of lime enclosed in pockets in another species of rock, all of volcanic origin, constituted the whole substance and physical constitution of said Navassa Island; and that said island never had contained a deposit of guano, and that the representations made to the Department of State, in the papers filed by the alleged discoverer of said island, certified copies of which papers were offered in evidence in the cause, and which papers alleged that said island did contain a deposit of guano, and was within the meaning of the act of August 18th, 1856, chapter 164, were wholly false and fraudulent, and the action of the Secretary of State thereon was obtained by such fraud and is wholly void.

A. STIRLING,
JOSEPH S. DAVIS,
Counsel for Def't.

16 *Plea of not guilty withdrawn, and plea guilty of manslaughter confessed as to some of the prisoners.*

And thereupon, on the 15th day of February, 1890, come to the bar of the court here Norman Wooster, Edward Woodfork, and James Tasker (under the custody of the marshal of said district), and in their proper persons each of them withdraws the plea of not guilty above pleaded, and say that they can not deny but that they are guilty of manslaughter in the indictment aforesaid above laid to their charge in manner and form as by the indictment aforesaid is above against them alleged, and they put themselves upon the mercy of the court.

Non pros as to the other prisoners.

And thereupon, on the same day last aforesaid, upon the motion of the attorney for the United States, a non pros is entered as to Henry Jones, Edward Smith alias "Devil," James H. Robinson alias "Snow," Alfred Jones alias "Texas," Edmund Francis alias "Blueball," James Phillips, Cæsar Fisher, Charles H. Davis, James Johnson alias "Tom Welsh," Amos Lee, Alfred Brown, Stephen Peters, and Charles H. Smith alias "John Ward."

Same day motion for new trial and in arrest of judgment is by the court here overruled.

Judgment of death.

And thereupon, the said George S. Key being brought at the
17 bar of the court here, it is forthwith demanded of the said George S. Key if he hath or knoweth anything to say wherefore the court here ought not, upon the premises and verdict aforesaid, to proceed to judgment against him? Who nothing further saith, unless he hath said; whereupon, all and singular the premises being seen and by the court here fully understood, it is therefore considered by the court here that the said George S. Key be hanged by the neck until he be dead; that the marshal of this district, or one of his deputies, do cause execution to be done in the premises on the 28th day of March next ensuing; that he be now taken hence to the Baltimore city jail, to be there or in some other safe and convenient place within this district safely kept until the day of execution, and from thence on the day of execution appointed he be taken to the place of execution, there to be hanged by the neck until he be dead.

Judgment of confinement in the penitentiary.

Therefore it is considered by the court here that the said James Tasker do undergo a confinement at hard labor in Albany County penitentiary, situated at Albany, in the State of New York, for the period of ten years, and that he pay a fine of one hundred dollars; and that the said Edward Woodfork and Norman Wooster alias "Juggler" do each undergo a confinement at hard labor in Albany County penitentiary, situated at Albany, in the State of New York, for the period of five years, and that each of them pay a fine of one hundred dollars. And thereupon the said James Tasker, Edward Woodfork, and Norman Wooster alias
18 "Juggler" are committed to the custody of the marshal of this district, to be by him as soon as possible safely removed to the penitentiary aforesaid, therein to be kept, etc.

Memorandum.

Verdict in this case was rendered on the 2nd day of December, 1889, and judgment was rendered on the 20th day of February, 1890.

Petition and order for writ of error.—Filed March 18th, 1890.

THE UNITED STATES,
vs.
GEORGE S. KEY.

In the circuit court of the United States for the district of Maryland.
November term, 1889.

To the honorables the judges of said court:

The defendant, George S. Key, prays the court to order the issue of a writ of error to the Supreme Court of the United States from the final judgment of the court against this respondent, sentencing him to suffer

death for the murder of James Mahon, the said judgment being passed upon the conviction of the respondent in the trial had during the same term at which this petition is filed.

GEO. S. KEY.

Witness:
JOHN H. MEYER,
Deputy Warden.

19

ARCHIBALD STIRLING,
E. J. WARING,
JOSEPH S. DAVIS,
J. EDWARD STIRLING,
Attorneys for Respondent.

Let the writ issue as prayed.

HUGH L. BOND,
Ct. Judge.
THOS. J. MORRIS,
Dt. Judge.

Writ of error.

20 UNITED STATES OF AMERICA, *ss*:

The President of the United States to the honorable the judge of the circuit court of the United States for the district of Maryland, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, or some of you, between the United States and George S. Key, a manifest error hath happened to the great damage of the said George S. Key, who was convicted of murder and sentenced to death as by his complaint appears, we being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court, to be then and there held. that the record and proceedings aforesaid being inspected the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the honorable Melville W. Fuller, Chief-Justice of the said Supreme Court, the 18th day of March, in the year of our Lord one thousand eight hundred and ninety.

[SEAL.] JAMES W. CHEW,
Clerk of the Circuit Court of the United States,
Fourth Circuit and District of Maryland.

Allowed by—

HUGH L. BOND,
Ct. Judge.
THOS. J. MORRIS,
District Judge.

Citation waived.

THOMAS G. HAYES,
U. S. Atty.

21 In pursuance of said writ of error, and according to the statute in such case made and provided, a record of the judgment aforesaid, with all things thereunto relating, together with the said writ of error annexed, is hereby transmitted to the said Supreme Court of the United States accordingly.

UNITED STATES OF AMERICA,
District of Maryland, to wit:

I, James W. Chew, clerk of the circuit court of the United States for the fourth circuit in and for the district of Maryland, do certify that the aforegoing is a full and true record of the proceedings and judgment in the said prosecution against the said George S. Key and others, lately depending in the said court.

In testimony whereof I hereto set my hand and affix the seal of the said circuit court on this 27th day of March, A. D. 1890.

[SEAL.] JAMES W. CHEW,
Clerk of said Circuit Court.

22 (Indorsement on cover:) No. 1598. George S. Key, plaintiff in error, *vs.* The United States. Maryland C. C. U. S. Filed April 1, 1890. Supreme Court U. S., clerk's office. Received Mar. 31, 1890.

In the Supreme Court of the United States.

GEORGE S. KEY
v.
UNITED STATES OF AMERICA. } No. 1598.

ERROR TO THE CIRCUIT COURT FOR THE DISTRICT OF MARYLAND.

The United States of America, defendant in error in this case, respectfully petitions that the same be advanced upon the docket of this court and assigned for an early hearing.

On the 15th day of February the plaintiff in error was by the judgment of the said court sentenced to death for murder, the sentence to be executed on the 28th day of March, 1890.

In pursuance of the provisions of section 6 of the act of Congress which went into effect on the 6th day of February, 1889 (25 Stat. L., 656), a writ of error has been sued out to this court, and such writ operates by virtue of said statute as a stay of proceedings upon such judgment. The said statute provides that all such writs

of error shall be advanced to a speedy hearing on the motion of either party. In pursuance of that statute this application is made.

W. H. H. MILLER,
Attorney-General.

IN THE

SUPREME COURT OF THE UNITED ST

GEORGE S. KEY,
PLAINTIFF IN ERROR,
vs.
THE UNITED STATES.

HENRY JONES,
PLAINTIFF IN ERROR,
vs.
THE UNITED STATES.

EDWARD SMITH,
PLAINTIFF IN ERROR,
vs.
THE UNITED STATES.

BRIEF FOR PLAINTIFFS IN ERROR.

ARCHIBALD STERLING,
JOHN HENRY KEESE, JR.,
E. F. WARING,
JOSEPH S. DAVIS,
J. EDWARD STERLING,
Counsel for Plaintiffs in

IN THE

SUPREME COURT OF THE UNITED STATES.

GEORGE S. KEY,
PLAINTIFF IN ERROR,
vs.
THE UNITED STATES.

HENRY JONES,
PLAINTIFF IN ERROR,
vs.
THE UNITED STATES.

EDWARD SMITH,
PLAINTIFF IN ERROR,
vs.
THE UNITED STATES.

BRIEF FOR PLAINTIFFS IN ERROR.

These cases, three in number, come before the Court under writs of error from judgments of the Circuit Court of the United States for the Fourth Circuit, District of Maryland. These judgments sentenced each of the above named plaintiffs in error to be hanged for murder. Key for the murder of James Mahon, Jones for the murder of Thomas N. Foster, Smith for the murder of Samuel Marsh.

The points in the appeal are substantially the same, and on the argument will be one, and the plaintiffs in error are in forma pauperum, the counsel file one brief.

There is a demurrer and a motion in arrest of judgment in each Record, each overruled below, and in each of the cases of Jones and Smith there is a bill of exceptions, the contents of which are the same.

The cases all bring up before this Court the acts of Congress of 18th of August, 1856, chapter 164; July 28th, 1866, chapter 298; 2nd of April, 1872—which are all comprehended in Title 72, Revised Statutes, "Guano Islands."

The writs of error are all taken under the act of Congress.

Chapter 113, Fiftieth Congress, 1889, statutes passed at second session of Fiftieth Congress, pages 655, 656, sections 6 and 7.

Counsel for prisoners will contend in support of the demurrers to the indictment and the motions in arrest of judgment:

First. That the whole of the Title 72 and the Acts embraced therein are unconstitutional and void.

The Guano Law Unconstitutional.

"The Guano Law" under which it is sought to punish the appellants is unconstitutional.

1. Because upon what principle known to the Constitution, can the authority of Congress be invoked to exercise its authority to use the army and navy and the Courts of the United States to protect private owners of property in the *locus in quo?*

The *locus in quo* is an island, in which the Federal Government should have its power present to protect, as well as to punish. There was and is no United States officer at Navassa, and the private owners of the island, under this law, can call upon the army and the navy of the United States to protect them in their property rights.

2. The Act is unconstitutional, because by its very terms only criminal jurisdiction is conferred upon the Courts of the United States, and wherever Congress attempts to confer judicial power, or to extend the judiciary of the United States, it is compelled to confer both civil as well as criminal jurisdiction, and under this Act there is no civil jurisdiction conferred

over the subject matter, over the parties or territory of the *locus in quo*.

3. The argument of unconstitutionality cannot be successfully answered by the argument of *inconvenience* resulting from the general absence of any power to punish, but on the contrary it has been expressly decided that when a violation of the constitution is clear, no argument of inconvenience has any weight.

State vs. Springfield, T. P., 6th Ind. 84.
Beebe vs. The State, 6th Ind. 501.
Case of Oakley vs. Aspinwall, 3 Comstock, N. Y. 547-68.

4. It is a concessum that any right or authority over the *locus in quo* must have been obtained or acquired by the Government of the United States either from a title acquired by occupancy, discovery, conquest or cession. The title to the *locus in quo* was not acquired by occupancy, conquest or cession.

Wheaton's International Law, section 161.

The title to the *locus in quo* is alleged to have been acquired by a peculiar species of discovery described in the statute.

It will be conceded that the broad legal meaning of title by right of discovery means a title that is *permanent*, *fixed* and *indefeasible*, except by conquest or cession, while on the other hand, the discovery referred to may be defeated if the guano soil be sold to foreign nations without permission of Congress and the rights of persons and the rights of things in the *locus in quo* are thus defeated. Not only is this true, but further complications arise; and it will be more clearly seen that the statute itself, even after the peculiar species of discovery referred to, does not vest in the United States a permanent and fixed title to the *locus in quo*, because by the *very terms of the Act*, all provisions relating to the rights of things and the rights of persons shall terminate when the soil itself is finally removed; and thus it is seen that it is not a *fee* title. It is not an absolute claim to the title in the *locus in quo*, but upon the very face of the statute it is merely a temporary, defeasible title to terminate upon the happening of some peculiar

event described in the Act. And the question is now raised for the imprimatur for the first time in this Court, whether or not by the Constitution, any authority whatsoever is conferred upon Congress, which represents the Federation of States to exercise the jurisdiction which is sought to be maintained in this cause by reason of the discovery of the *locus in quo*, which *discovery* is made the foundation of all the provisions, rights, duties and obligations created by "The Guano Act." And the broad question which is intended to be presented is whether or not there can be discovered by intendment or implication in the Constitution any shadow of authority which would justify Congress in legislating as they have done in "The Guano Act" upon the theory of the discovery to which the Act refers, whatever may be said with reference to the power of Congress to deal with any new territory acquired by discovery, conquest, occupancy or cession; and the issue involved here is, what part of the Constitution clothes Congress with power to deal with the *locus in quo* upon the single, sole and exclusive ground that it is alleged to have been discovered by an American citizen? And this view is presented independendent of the complicated foreign relations which may exist by reason of the claim of the Haytian Government to the *locus in quo*, which claim has been open and notorious since 1857, the time of the alleged discovery. It is true that the Constitution empowers Congress to make rules respecting territory belonging to the United States, and 'this power has been exercised since the foundation of the Government; and the statute in question clearly discloses, and the proceedings in the Record conclusively show that there was no attempt or intention that the United States Government should acquire title to the *locus in quo*, and hence it does not belong to the United States. In fact, the learned Court from which this appeal is prosecuted has actually determined judicially that there is nothing in "The Guano Act" to show title to the United States or the discoverer; and the Court in its opinion states that "The Guano Act" expressly provides that the *locus in quo* should not become part of the territorial domain of the United States.

Grafflin vs. Navassa Phosphate Co., 35 Federal Rept. 474-6.

The position of a conviction for murder under this indictment is extraordinary and anomalous when it is reflected that the *locus in quo* is not a part of the territorial domain of the United States, and the conviction followed from a prosecution based upon the provisions of "The Guano Act." The legal obstructions to the sanction of this verdict by a decision of this Court are greatly heightened in view of the decision of the learned Court below, that the *locus in quo* is not land or real estate, (Grafflin's case above,) but that the *locus in quo* is merely an artificial right, a commercial privilege, *i. e.*, merely an easement, a right or a way.

There is one other word in the statute to which it is desired to direct the attention of the Court; the Act provides that after this peculiar discovery and certain other formalities, the island or *locus in quo* shall be deemed to "appertain to" the United States. It is respectfully inquired what is the legal significance or meaning of this desultory phrase, "appertain to?"

Then it is submitted, whether or not, in view of the fact that the Government must acquire title to a *locus in quo* by occupancy, discovery, conquest or session, and the title so claimed must be permanent, fixed indefeasible, or, in *legal* terms, a *fee*, and inasmuch as it is known that dock-yards, navy-yards, arsenal grounds, territories and districts over which the United States exercises its jurisdiction, are claimed under an indisputable indefeasible title, can Congress, by the provisions of the Constitution pass an Act creating and setting up a peculiar kind of title such as is described in this Act and is fully comprehended in the words "appertain to." Further, can Congress upon such a questionable title proceed to legislate and confer power upon the judiciary of the United States to exercise its authority and functions over and concerning persons and things in and upon the *locus in quo* held under such a title?

5. This act is unconstitutional because it attempts to extend the admiralty law and jurdisdiction over land. There is another, perhaps less constitutionally grave, but not less fatal, legal impediment to be found, which is apparent when it is reflected that Congress assumes to extend by this statute admiralty jurisdiction in criminal cases over the *locus in quo*,

which is land. The question is, is the Court of the opinion admiralty jurisdiction can be made to depend upon the constitutional power of Congress to regulate commerce? Are not admirality jurisdiction, and the power of Congress to regulate commerce two separate distinct grants under the Constitution? It will be noticed that the language of the statute is that any crimes committed upon the *locus in quo* shall be "*deemed* to have been committed upon a vessel upon the high seas;" this, it is submitted, is nothing more nor less than an attempt to extend the admiralty jurisdiction over this island, the *locus in quo*, which is land or *terra firma*. It is submitted that if the admiralty jurisdiction can be extended over land, it must be by some analogy found to exist between the land and the sea. 35th Federal Reporter, 475. What analogy exists between the island, the *locus in quo* and the sea? Whatever other analogies may exist there is no property in any particular nation in any particular portions of the high seas; and if for no other reason, in this important respect, the analogy fails, because there is a commercial property, right, privilege or title in the *locus in quo*.

But this statute, if it can be maintained at all, must be construed in the light of such legal principles as are brought to bear in construing a penal statute. Penal statutes are always strictly construed, and there can be no constructional crimes. State vs. Lowell, 23d Iowa, 304. Lair vs. Killmer, 1st Dutcher, New Jersey, 524. This statute in excess of constitutional limitations must be construed as if it were a penal statute within constitutional limitations. So strictly has this construction been contended that it is still said that there can be no constructional crimes. Since this is a penal statute it must be passed upon in the light of the power conferred by the Constitution on Congress to pass penal statutes, and in interpreting this grant of power we must construe the Constitution strictly, both as to locality and nature of the crime. Sedgewick on Statutory and Constitutional Constructions, page 280–81. 5th Wheaton, 144. As to property or personal security, penal statutes must be construed strictly, and if the power is doubtful, courts should not exercise it. And when a power is granted in general terms, the power is co-extensive with the terms, and

the powers under the Constitution must not be enlarged beyond a fair scope of its terms, because restrictions are inconvenient, impolitic, or even mischevious. Storey on the Constitution, Vol. 1, Sec. 418, 419, 424 and 426. The construction must be in the light of the common law and lean towards personal liberty. Congress gets its power to legislate in criminal cases from the Constitution, and such clauses of the Constitution giving such powers must be strictly construed. Wheberger's case, 5th Wheaton, 94-5. Under the Constitution, Article 1, Section 8, and Article 3, Section 8, the criminal jurisdiction of Federal Courts in criminal cases is expressly and clearly confined to the punishment of treason, piracies, offences on the high seas, offences against the law of nations, and against the postal system by implication. The crimes in question, it will be conceded, are neither treason, piracies, offences against the law of nations nor offences against the postal system. The statute under which it is sought to punish these crimes declares that these crimes must be punished as if committed upon the high seas. Had Congress the right to pass a law that makes the *locus in quo*, the high seas, the same as the *locus in quo* when land, or an island? Crimes upon the high seas are punished under the criminal portions of the admiralty law. Is there anything in the nature or extent or the doctrine of the admiralty law that justifies such a piece of legislation? The judicial power of the United States extends to all cases of admiralty and maritime jurisdiction: then the power to pass this statute must have come either from the Constitution of the United States, Article 1, Section 8, or Article 3, Section 2. It is clearly not a regulation of commerce, for the Act does not aim to protect the commerce, but mining; and the Court will perceive the distinction between a regulation of commerce concerning guano on board of ships which is protected and regulated by the general admiralty law and an attempt to regulate and control the handling or the mining of guano upon an island. Therefore, since it is settled in Allen vs. Newberry, 21st Howard, page 46, that admiralty jurisdiction is connected with commerce and navigation, and since admiralty jurisdiction cannot be made to depend upon the power of Congress to regulate commerce, because they are

distinct, it is conferred by separate grants of the Constitution. See Belfast, 7th Walace, 640.

It is, therefore, asked, could Congress pass this statute in question which extends the jurisdiction over places and things not within the scope of admiralty according to the well established doctrines of the law? Congress can no more establish a system of admiralty law on land and punish crimes under admiralty law committed thereupon, than it can establish martial law in time of peace. The Constitution confers admiralty and maritime jurisdiction according to the nature, extent and modifications of the common law. Story on Constitution, Sec. 1673. Note, Kent, Vol. 1, 17th lecture, page 361. In cases fully dependent upon locality, admiralty jurisdiction is limited to the sea. The United States vs. Combes, 12th Peters, United States Report, page 72. Neither Congress nor Court can make causes, cases of admiralty which are not so by the Constitution. Bevan's case, 3d Wheaton, 362. Cognizance of cases in our admiralty practice as given by the Constitution, extends to the criminal and civil jurisdiction as known to the English and maritime law when the Constitution was adopted. 1st Kent, Lecture 17. Story, page 368, 370. And admiralty jurisdiction is the same as understood at the adoption of the Constitution. 3d Dallas, 297. An act to come under admiralty must arise wholly upon the sea. 2d Story on the Constitution, Chapter 20, page 91. The power to punish felonies on the high seas means water. 5th Wheaton, 184. Wallace 76. 5th Howard, 463–4. The best guides as to admiralty jurisdiction are the Constitution, laws and decisions. The Belfast, 6th Wallace, 636. And furthermore, it is submitted that in extending admiralty jurisdiction over land, the reason of the rule ceases.

The reason that admiralty punishes crimes on shipboard as stringently and severely as it does is, because of the remoteness of ships on the high seas from Government, Courts, civilization; and it is to be remembered that it is settled that if a man murders his officer on shipboard on the high seas, the presumption is that the prisoner was resisting lawful force.

Will any one contend that under the provisions of this "Guano Act" a man who killed an overseer upon this island, the *locus in quo*, should have to be confronted in Court with the legal presumption that he was resisting lawful force? Would Congress have the right to place one citizen in that position towards another on land and in the midst of a private enterprise? Would not this change the rules of evidence and be clearly contrary to what is meant by due process of law? As to the nature of maritime and admiralty law under the American doctrine, it is submitted that English maritime law is our maritime law. 18th Walace, 889. The Siren. General maritime law is the basis of our own. 21st Wallace, 558. No single nation can change the law of the sea. 14th Wallace, 170. Congress cannot make the limits of admiralty broader than the judicial power may determine are the true limits. St. Lawrence, 1st Black, 526–7. Affirmative words of a clause of the Constitution giving one sort of jurisdiction must imply a negative of any other sort of jurisdiction. 2d Cooley on the Constitution, Sec. 1717.

CASES DECIDED.

It has been decided that where a blow is given on sea, and death resulted on land, such a case does not come under admiralty and maritime jurisdiction within the meaning of the Constitution or English admiralty law. United States vs. McGill, 4th Dallas, 426. The expression in the Laws of the United States giving Congress power to punish crimes in certain places "and in other places" means similar places, that is navy-yard, arsenal, dock-yards, etc. Bevans' case 3d Wheaton, p. 390. A tort committed on shore or in a foreign port does not come under admiralty jurisdiction, and admiralty cannot draw to itself a tort on shore though it be a gravamen mixed with tort on sea. Adams vs. Hafford, 20th Pickering 127. The case of the United States vs. Davis, 2d Sumner 482, decides that manslaughter is punishable by the Federal Courts, under Crimes Act of 1790, Chap. 31. Sec. 12, only when committed upon *the high seas*, and it is submitted that by no implication or analogy can the *locus in quo* be regarded as the high seas.

Admiralty has not and never deliberately claimed jurisdiction over any torts but those on high seas.

Thomas vs. Lane, 2d Sumner, 9 and 10.

If the "Guano Law" is Constitutional, then what follows:

2. That the evidence sought to be introduced and ruled out and made cause of motion in arrest of judgment in United States vs. Key and excepted to in United States vs. Jones, and United States vs. Smith, ought to have been admitted. It proved the facts mentioned in Section 5574.

The bills of exceptions on this point are as follows: Records of Jones and Smith, page 14.

"JOHN H. HASKELL, recalled.

Q. (By MR. STIRLING.) State whether you know, from the records of the company, that a vessel was loaded with this phosphate of lime at Navassa, after the 16th of April, 1889, the vessel being a foreign vessel, and the cargo being intended for the use of persons other than residents or citizens of the United States?

MR. HAYES. Let it come in as it did before. Let the stenographer record the answer, and then I will move the Court to strike it out as irrelevant. Of course, we object to the question.

The COURT. Let the witness answer the question, and then I will strike it all out as immaterial.

A. A vessel was loading at the time—was more than half loaded—on the 16th of April, 1889.

Q. When did she finish loading?

A. A few days afterwards.

Q. A vessel under the circumstances and of the character asked in the question?

A. Yes, sir.

The COURT. As suggested before, my opinion is that this does not in any way affect the parties to this case. I therefore rule it out from the consideration of the jury as immaterial.

Mr. STIRLING. If your honor please, we ask to have an exception noted.

Which testimony so offered the Court ruled out and withdrew from the consideration of the jury as immaterial, to which ruling the defendant excepted, which exception
29 was accordingly overruled by the Court, and the defendant as herein aforesaid excepted, and presented this bill of exceptions to the Court, and requested the Court to sign and seal the same. It is so done by the Court this 21st day of December, 1889.

THOS. J. MORRIS, [SEAL.]
Judge."

The object of this offer of evidence thus ruled out was to prove that in violation of section 5,572 Revised Statutes, and on and after the 16th day of April, 1889, more than five years after the 14th of July 1872, the beginning of the time of the suspension of the provisions of this section, guano or phosphate was taken from the island, not for the use of citizens of the United States or of persons therein resident, but for the use of British subjects and residents, and that therefore all the contracts with the laborers offered in evidence were void, and the whole jurisdiction and power of the United States over the island ceased.

The Court ruled this out and said, "my opinion is that this does not in any way affect the parties to this case. I rule it out as immaterial."

This section says: "*The discoverer or assigns shall enter into bond as may be required by the President, to deliver the guano to citizens of the United States for the purpose of being used therein, and to none others, &c., and any breach of the provisions thereof shall be deemed a forfeiture of all rights accruing under and by virtue of this title.*" This was suspended during five years, from July 14th, 1872. The evidence offered proved a forfeiture of all rights accruing under and by virtue of this title, on the 16th of April 1889, and the offences for which the prisoners were convicted occurred September 17th, 1889.

It assuredly was evidence as to the relations of master and servants between the prisoners and the officers of the assigns of the discovery of all the titles accruing under the section to be forfeited. They were without power therefore to get the

benefit of the contract of employment offered in evidence. They had lost all right to occupy the Island and to dig guano or load it or sell it. And the "riot" which occurred is stated in the bill of exceptions to have been between the prisoners and other laborers and the white officers of the company, the assigns of the discoverers, and it was impossible for the jury to judge correctly of the guilt of the prisoners when they were told that this evidence was immaterial, and they were to treat all orders, duties, labors and other things, and *force* used by the officers to the men, as *lawful*, and their *resistance*, which occurred, as *unlawful*.

But beyond this the language is, of section 5,514, that all rights accruing under and by virtue of this title shall be deemed forfeited.

Now the evidence offered by the United States, which is all in the bill of exceptions, shows that the only evidence the United States introduced as to the action of the President under the section 5,570, was the proclamation of Mr. Cass, Secretary of State, and that while stating, "that the bond, according to the Act of Congress of August 18th 1856, had been entered into, "which shows perhaps that the President had fixed the penalty and approved the surities, yet it only states that the said E. K. Cooper is entitled, in respect to the guano in said island, to all the privileges and advantages intended by that Act to be secured to citizens of the United States who have discovered deposits of guano, provided always that said Cooper shall abide by the conditions and requirements imposed by the Act of Congress aforesaid.

Now this does not say that the President had exercised his discretion, as provided in section 5,570, as to the island pertaining to the United States, and it is not sufficient, and there was no sufficient evidence of the allegations of the indictment that the island pertained to the United States and was under the sole and exclusive jurisdiction of the United States. It belonged to Hayti. The possession taken by Cooper and held since by his assigns, was peaceable, because Hayti was not so situated as to resist; but to hang these men under this jurisdiction will never do. Cooper's assigns failed to observe the bond in the conditions mentioned therein, and all rights in Navassa

of the United States and the citizens, ceased. The foundation of this immense superstructure of law and cannon fell on the 16th of April 1889.

All the enactments as to laws to punish crime, and for the use of the army and navy, &c., depend on Section 5570. If the President did not exercise his discretion as *to the jurisdiction to the United States, and failed to say he had so exercised it*, then the section of the law fixing penalties never took effect on this island, and if it did take effect under this proclamation of the *Secretary of State* that proclamation says "it is provided that said Cooper shall abide by the conditions and requirements imposed by the act of Congress," and all hangs on that.

Now this Island of Navassa is forty-five miles from St. Domingo and seventy miles from Jamaica, as appears in the United States proof from the State Department. It rises high above the sea. It is marked on old plats of the Carribbean Sea and called "Navassa," as the United States proof says. An American citizen finds upon it a phosphate of lime; when the island was certainly known and visited by the Spanish and French and unquestionably belongs to Hayti.

It is an extraordinary discovery that this island was "not within the lawful jurisdiction of any other government," and the Secretary of State, General Cass, under these circumstances, draws his proclamation mildly. He says: "Cooper has the right to the advantages and privileges of the Act of Congress, provided" (that is, as long as) "he conforms to it," but he nowhere declares that the island was not within the lawful jurisdiction of any other government, nor that the President in his discretion had decided it to appertain to the United States. Hayti is understood to have protested, and now to take the same position and to claim that this island since her existence belongs to her as it did before to Spain and to France. The administration of 1856 did not care much for the colored people of Hayti, and the United States then sent no minister there, but they seemed to have cared enough to give the claimants only what they did give them, and the language of the proclamation does not gratify the statute nor sustain the allegations of the indictment as to jurisdiction.

The island *was* within the lawful jurisdiction of another government, and the President has not declared the contrary or made any such declaration as to his exercise of discretion under the statute, to sustain the allegations of these indictments that "the island was considered and recognized by the United States as appertaining to the United States, and was under the sole and exclusive jurisdiction of the United States."

The Court below was void of jurisdiction in these cases and the judgment should be reversed.

ARCHIBALD STIRLING,
JOHN HENRY KEENE, JR.,
E. J. WARING,
JOSEPH S. DAVIS,
J. EDWARD STIRLING,
Counsel for Plaintiffs in Error.

In the Supreme Court of the United States.

OCTOBER TERM, 1890.

EDWARD SMITH
vs.
THE UNITED STATES. } No. 1142.

HENRY JONES
vs.
THE UNITED STATES. } No. 1143.

GEORGE S. KEY
vs.
THE UNITED STATES. } No. 1144.

ERROR TO THE CIRCUIT COURT FOR THE DISTRICT OF MARYLAND.

BRIEF FOR DEFENDANT IN ERROR.

Each of the above-named cases, in the court below, presented the same questions. The record here in case No. 1144 differs from the others in containing no bill of exceptions. The plaintiff in error in each case was indicted in the district court for the district of Maryland for murder. As required by section 1039 of the Revised Statutes each

case was certified to the circuit court, where the prisoners were trted and sentenced to death.

The homicides for which these parties were indicted were committed upon the Island of Navassa, a small island or key about 2 miles in length and 1½ miles in width, situated about 45 miles from San Domingo and about 70 miles from Jamaica. The indictment in each case charges that this island or key was under the sole and exclusive jurisdiction of the United States and out of the jurisdiction of any particular State or district of the United States, but recognized and considered by the United States as containing a deposit of guano within the meaning and terms of the laws of the United States relating to such offenses, and recognized and considered by the United States as appertaining to the United States, and which was, at the date of the commission of the homicides, in the possession and under the laws of the United States relating to such offenses. And the indictment, thereupon, in apt language, charges that on the 14th day of September, 1889, each of the defendants committed murder upon the persons therein named.

From the bill of exceptions in cases 1142 and 1143 it appears that at the date named the island was occupied by one hundred and thirty-seven colored laborers and eleven white officers or superintendents, all residents of the United States, employés of the Navassa Phosphate Company, a corporation organized under the laws of the State of New York, which held said island as the assignee of the original discoverer thereof. As a matter of fact, as appears by the record, transcript 1143, page 14, the murders were committed in a revolt by the laborers, or a part of them, against

their officers, and were atrocious and brutal. By motion for a new trial, and in arrest of judgment, six errors were alleged:

(1) That the verdict is against the evidence.

(2) That the court erred in its instructions.

(3) That the court erred in not permitting the defendants to prove that on a day in April, 1889, and after the 20th, a cargo of phosphate of lime was sold by the Navassa Phosphate Company to persons other than citizens of the United States, for use of persons not citizens or residents of the United States, said phosphate being the same material known as guano of said island.

(4) That the indictment is defective in that it alleges that the Island of Navassa was at the time of the murder recognized and considered by the United States as containing a deposit of guano, instead of alleging directly that it was a rock island or key containing such guano.

(5) That the sections of the statute known as title 72 are unconstitutional and void, and therefore the court had no jurisdiction.

(6) That the so-called guano was not a guano, but was a mineral phosphate of lime of volcanic origin, and that said island never contained a deposit of guano; therefore the representations upon which the State Department acted were untrue, fraudulent, and therefore the United States obtained no jurisdiction.

The record not setting out either the evidence or the instructions of the court, the first and second of these causes for a new trial can not be considered.

As the Government has no case unless the courts below had jurisdiction, that question, raised by the fifth reason for a new trial, will be first considered.

I.

The jurisdiction is asserted under section 730 and title 72, sections 5570 to 5578 of the Revised Statutes. Section 730 reads as follows:

> The trial of all offenses committed on the high seas or *elsewhere* out of the jurisdiction of any particular State or district shall be in the district where the offender is found or into which he is first brought.

It is not disputed that this island was out of the jurisdiction of any State, and that these parties were first brought into the district of Maryland.

On behalf of the Government it is claimed that this island or key was discovered by Peter Duncan on the 1st day of July, 1857, and that, in compliance with the requirements of the sections above named, the same was lawfully brought, and thence continued to be, under the lawful jurisdiction of the Government of the United States. The indictment avers such jurisdiction. The Bill of Exceptions in 1143 shows some of the facts upon which such jurisdiction rests. It will be noticed, however, that it is not shown that the Bill of Exceptions contains all the evidence on this subject. On page 11 of the transcript in the last-named case is found the affidavit of Peter Duncan, the discoverer, as required by section 5571. This affidavit seems with precision to track the requirements of the statute, and thus to form a solid foundation for the executive action by which the jurisdiction of the United States over the island was asserted, as appears in the proclamation by the Secretary of State on page 12 of the transcript.

Upon what ground the claim that this act is unconsti-

tutional is based it is not easy to understand. If the Government of the United States has in any way acquired or could in any way acquire title to, or jurisdiction over, the island of Navassa, it is not seen why every section of the statute in relation thereto is not a legitimate exercise of that jurisdiction. Nothing is better established in international law than national title to territory, whether island or continental, by discovery and occupation, or by occupation alone. (Lawrence's Wheaton on International Law, 2d edition, p. 305. As applied to Guano Islands discovered by citizens of the United States, Wharton, chap. 14, secs. 310–314, Wharton's Int. Law Digest, sec. 2, 3, and 200.)

Indeed there is no such thing as national title except by discovery and occupation, and such national title has been asserted by all nations, often in disregard of the rights of the aboriginal possessors of the soil. (Wheaton, *supra*.) National title, insular or continental, so acquired, has the sanction of international law, a body of law recognized by all civilized nations of Europe and America.

As is said by Mr. Attorney-General Cushing in an opinion, 7 Opinions, page 232:

> We, the independent nations of Christendom, are associated together in a sort of commonwealth of States. To the ties of a common civilization between us are added those of numerous treaties, and of a common deference to certain doctrines and rules of right and justice, which not only guide us in peace, but even govern and control us in the very extremities of war.

This court has repeatedly recognized the binding obliga-

tion of this body of international law, and it has even gone so far as to hold that for Congress to name and prescribe a punishment for a crime on the high seas, for which a definition may be found in international law, is a sufficient compliance with the clause of the Constitution of the United States authorizing Congress to *define* and punish piracies. (*United States* vs. *Smith*, 5 Wheaton, p. 153; *United States* vs. *Pirates*, 5 Wheaton, p. 184.)

The title by discovery or occupation is, however, a title in the Government and not in the individual; and the individual can obtain no rights from such discovery or occupation, except under the act of Congress. (*American Guano Co.*, vs. *The United States*, 44 Barbour, p. 23.) *Grafflin* vs. *Nevassa Phosphate Co.*, 35 Fed. Rep., p. 474).

In each of the above-cited cases the identical statute now under consideration was under judicial review, and there seems to have developed no suggestion of its invalidity. That the United States Government asserted title and jurisdiction over this island appears clearly in this case. That it was ready to maintain this jurisdiction by whatever force might be necessary is equally clear. The determination of the Government in the premises more fully appears in Ex. Doc. No. 37 of the first session Thirty-sixth Congress, which is referred to in the Bill of Exceptions. The island, or key, being thus in the possession of this Government, it must be for the time being regarded as a part of the national domain. It is even held that territory seized in war and before cession by treaty is, so long as held in possession by the conquering party, to be treated as a part of its national domain.

(*Thirty Hogsheads of Sugar* vs. *Boyle and Others*, 9 Cranch, p. 191.)

If, then, it was competent for the Government of the United States by discovery and possession to acquire supremacy over this island, then it was just as competent for Congress to legislate with reference to the jurisdiction of the courts over the island as with reference to the jurisdiction of the courts over Alaska or any other *purchased* territory. The question is not as to the manner of acquisition, but as to the acquisition itself. It certainly needs no argument to establish the proposition that Congress has the power to legislate co-extensive with the national domain; not only co-extensive with the national domain, but co-extensive with the national authority, according to maritime and international law. Having such powers, Congress enacted section 5576, as follows:

> All acts done and offenses and crimes committed on any such island, rock, or key, by persons who may land thereon, or in the waters adjacent thereto, shall be deemed committed on the high seas, on board a merchant ship or vessel belonging to the United States, and shall be punished according to the laws of the United States relating to such ships or vessels and offenses on the high seas, which laws for the purpose aforesaid are extended over such islands, rocks, and keys.

In terms this section applies to the offenses under consideration.

It is said, however, that this section of the statute is unconstitutional, because it is not competent for Congress to extend admiralty jurisdiction to offenses committed on land. A very plain answer to this suggestion is that

section 5576 does not attempt to extend admiralty jurisdiction to offenses committed upon the land, but it does, as a matter of convenience, provide that the same punishment prescribed by statute for offenses committed on the high seas shall be meted out to similar offenses committed upon the land, and that the same rule as to the place of trial shall prevail in the one case as in the other. This is not an extension of admiralty jurisdiction as such, but is simply an extension of the statutes of the United States for the punishment of crimes committed upon the high seas to similar offenses committed upon the land. In either case the offenses are statutory, the penalties are statutory, and the practice is statutory. Is it doubted that it would be competent for Congress to provide that murder in Alaska, for instance, should be tried and punished under the same statutes as are prescribed for the District of Columbia?

It is a matter of public history that in organizing Territories Congress has repeatedly provided that the body of the laws of an adjacent State upon certain subjects shall be taken bodily as the laws of the new Territory. (Organic act of Alaska, sec. 7, vol. 23, Stats. at Large, p. 25). Section 5576 is simply a convenient way of enacting a code of laws for the Island of Navassa; no more, no less.

II.

But there is another ground upon which the jurisdiction of the courts for the district of Maryland can be sustained, totally independent of any considerations heretofore suggested. It seems to be a well settled principle of international law that any nation has the inherent right everywhere to supervise the conduct and try and punish its cit-

izens or subjects for crimes wherever committed, provided only that in so doing it does not contravene the laws, sovereignty, or jurisdiction of any other nation. (Lawrence's Wheaton International Law, pp. 231 and 232; 22 American Jurist, 383, 384, and 385.) It is upon this principle that consular and ministerial courts are established by this and other nations, not only in the territory but in the very capitals of such other nations. See Revised Statutes, section 4079, etc., in which an entire code of laws and practice for such consular and ministerial courts is established. An appeal is granted from some of these courts to the circuit courts in this country (secs. 4095, 4096), and it is too late now to question the validity of this exercise of jurisdiction. (*Dainese* vs. *Hale*, 91 U. S., p. 13.)

To be sure the right to exercise this jurisdiction in a foreign nation rests upon treaty; but the treaty is only necessary in order to get the consent of the foreign nation. No treaty can give to Congress a right to enact a law for which it has not authority under the Constitution. The treaty may grant a license; it can not confer a legislative power upon Congress. The power, as already stated, to enact laws for the government, trial, and punishment of American citizens for crimes wherever committed is inherent in Congress under the Constitution, as a like inherent power is vested in every other nation to supervise, try, and punish its own citizens or subjects. This power, then, existing in Congress to provide a law for the trial and punishment of crimes committed by citizens of the United States, where not in conflict with the law of any other country, subsection 3 of section 2, Article III of the Constitution, confers upon Congress unlimited power in pre-

scribing the place for such trials. That subdivision reads as follows:

> The trial of all crimes, except in cases of impeachment, shall be by jury, and such trials shall be held in the State where said crimes shall have been committed. *But when not committed within any State, the trials shall be at such place or places as the Congress may by law have directed.*

* The indictment charges that the defendants were all from the district of Maryland, and the bill of exceptions, 1143, page 12, recites:

> That at the time of the commission of said act the persons on the island consisted of 137 colored laborers of said company and 11 white persons or superintendents, all residents of the United States, etc.

Upon this independent ground, therefore, it appears that the jurisdiction of the courts for the district of Maryland may be safely rested.

III.

But it is insisted in the sixth reason for a new trial that the so-called guano was not a guano, but was a mineral phosphate of lime of volcanic origin, and that said island never contained a deposit of guano. To this I answer:

(1) The question whether the island is of such a character as to authorize the executive department of the Government to assert jurisdiction over it is a political question for decision by that department. When a citizen of the United States discovers a deposit of guano on any island, rock, or key, occupies the same, and desires to acquire property in the same, under the sanction of Title

72 of the Revised Statutes he is required to give notice, verified by affidavit, to the Department of State of such discovery, occupation, and possession, describing the island, rock, or key, and the latitude and longitude thereof as near as may be, and showing that such possession was taken in the name of the United States, and shall furnish satisfactory evidence to the State Department that such island, rock, or key, was not, at the time of discovery and occupation by the claimant, in the possession or occupation of any other government or of the citizens of any other government (sections 5570 and 5571). And thereupon, in the discretion of the President (not of the courts), said island, rock, or key shall be considered as appertaining to the United States.

In other words, the executive department is the tribunal for determining whether the necessary facts exist to give the Government jurisdiction over the island. That department is required to hear and determine that question, and its action can be reviewed by no other department. Not only is the President to determine this question under the statute, but under section 5577 "the President is authorized at his discretion to employ the land and naval forces of the United States to protect the rights of the discoverer, or of his widow, heirs, executor, administrator, or assigns."

Is it to be said that the action of the executive department, in finding the existence of the necessary facts upon which to exercise this jurisdiction, is to be reviewed and reversed by the judicial branch of the Government, notwithstanding that the army and naval forces may be brought to bear to enforce jurisdiction? The question

submitted to the President in this matter is a purely political question; one with which the courts have nothing to do. (*State of Georgia* vs. *Stanton*, 6 Wallace, p. 50; *Luther* vs. *Borden*, 7 Howard, p. 1.)

In *Kennett et al.* vs. *Chambers* (14 Howard, p. 38) it is decided that the political department of the Government has exclusive authority to recognize or to refuse to recognize a new government in a foreign country. Is it not clear that the assertion of the authority of this Government over new territory is equally within the jurisdiction of the political department?

The distinction between the political and judicial functions is vital, especially in a government of independent departments like ours. (Cooley's Constitutional Limitations, 6th ed., p. 119, note.)

(2) Even if this were not a political power, it is a power specially lodged in the discretion of the President. He is required to investigate the facts, and his conclusion upon the facts is binding upon every other branch of the Government. In *Martin* vs. *Mott* (12 Wheaton, p. 19) it was decided that the finding of the President that the exigency existed demanding that he call out the militia was final and conclusive. The statute under consideration in that case provided that whenever the United States shall be invaded or be in imminent danger of invasion, etc., it shall be lawful for the President, etc., to call forth such number of the militia as he may judge necessary to repel such invasion.

Mr. Justice Story, speaking for the court, says:

> The power itself is confided to the Executive of the Union, to him who is, by the Constitution, "the

> Commander-in-Chief of the militia when called into the actual service of the United States," whose duty it is to "take care that the laws be faithfully executed," and whose responsibility for an honest discharge of his official obligations is secured by the highest sanctions. He is necessarily constituted the judge of the existence of the exigency in the first instance, and is bound to act according to his belief of the facts. If he does so act, and decides to call forth the militia, his orders for this purpose are in strict conformity with the provisions of the law, and it would seem to follow as a necessary consequence that every act done by a subordinate officer, in obedience to such orders, is equally justifiable. The law contemplates that, under such circumstances, orders shall be given to carry the power into effect, and it can not therefore be a correct inference that any other person has a just right to disobey them. The law does not provide for any appeal from the judgment of the President, or for any right in subordinate officers to review his decision, and in effect defeat it. *Whenever a statute gives a discretionary power to any person, to be exercised by him upon his opinion of certain facts, it is a sound rule of construction that the statutes constitute him the sole and exclusive judge of the existence of those facts.*

Further along it is said:

> If the fact of the existence of the exigency were averred, it would be traversable, and, of course, might be passed upon by a jury; and thus the legality of the orders of the President would depend, not on his own judgment of the facts, but upon the finding of those facts upon the proofs submitted to a jury.

The subject under consideration is very fully discussed in the case from which these citations are made, and every

word of that discussion is equally apt in the present case. To the same effect is *Dorsheimer* vs. *United States*, 7 Wall., 166; *Luther* vs. *Borden*, 7 Howard, pp. 43–45; *United States* vs. *Speed*, 8 Wallace, p. 83; *in re day.*, 27 Fed. Rep., 678, and *United States* vs. *Doherty*, 27 Fed. Rep., 730. This is in harmony with the rule applied to courts, that where courts are authorized to make an affirmative decree only in case a given state of things is found to exist, the judgment or decree of a court of general jurisdiction, or of limited jurisdiction when the jurisdiction is shown, is conclusive as to the existence of those facts in collateral proceedings. (*Dequindre* vs. *Williams*, 31 Ind., p. 444; *United States* vs. *Arredondo*, 6 Peters, p. 729.)

In *Whiton et al.* vs. *The Albany City Insurance Company* (109 Mass., p. 24) the question was whether the very proceedings in question in the case at bar were admissible in evidence by the insurance company for the purpose of proving that this Island of Navassa was known as a guano island, as, if it was, it was within the prohibitions of the marine policy in suit. It was held that such evidence was proper, though in the particular case not conclusive as to the meaning of the term "guano" in the policies, and, as between private parties, that ruling was probably correct. As between the United States Government and its citizens, however, it is insisted that the conclusion of the Executive Department of the Government upon this subject precludes controversy or evidence.

Even in that case it was held that the issue was not whether the material found on the island was guano, in fact, but whether in commerce it was generally so named.

IV.

The point made in the fourth reason for a new trial, namely, that the indictment alleges that the Island of Navassa was, at the time of the murder, "recognized and considered by the United States as containing a deposit of guano, instead of alleging directly that it was a rock, island or key containing such guano;" so far as it presents any question presents the same as the sixth reason for a new trial, and is substantially covered by the discussion under that head.

I insist that the averment that this island was then and there "recognized and considered by the United States as containing a deposit of guano" within the meaning of the laws of the United States relating to such island, and that it was then and there recognized and considered by the United States as pertaining to the United States, and then and there in the possession of the United States under the laws of the United States, and that it was under the sole and exclusive jurisdiction of the United States, and not of the jurisdiction of any particular State or district of the United States, covers all the requirements of the statute. Indeed it would not have been proper to have alleged that there was a deposit of guano upon this island, for in the language of this court in *Martin* vs. *Mott* (12 Wheaton, p. 19), cited above, if the fact of the existence of such guano was averred, it would be traversable, and of course might be passed upon by the jury, and thus the legality of the orders of the President might depend, not upon his own judgment of the facts, but upon the finding of those facts as submitted to the jury. The fact necessary to be estab-

lished in the case in order to uphold jurisdiction was not that the guano existed, but that the Government had so found, taken possession, and asserted jurisdiction. These facts could be investigated without reviewing or attempting to reverse the action of the political branch of the Government. To make an issue as to whether, in fact, this was a guano island, was to review, and possibly reverse the finding of that department of the Government specially charged with the determination of the question.

V.

But it is urged that the court erred in not permitting proof that on the 16th day of April, 1889, the Navassa Phosphate Company shipped guano to a foreign country in violation of section 5574, Revised Statutes.

The answer to this is, first, that on the 16th day of April, 1889, the law of Congress, passed on the 18th day of April, 1884, suspended section 5574 as to this point, for the period of five years, so that such shipment was not unlawful.

Secondly, it is entirely clear that the provisions for forfeiture in section 5574 have relation to private rights only, and do not have any bearing upon the question of the jurisdiction of the United States in the premises. The first part of the section provides that no guano shall be taken from any such island, etc., except for the use of the citizens of the United States, or persons resident therein; it then requires the discoverer to give a bond conditioned for the delivery of such guano only to citizens of the United States, and then provides that a breach of the provisions of the bond shall work a forfeiture of all rights

accruing under and by virtue of this title. That the rights referred to are purely private rights is too clear for argument. So it was expressly held by Mr. Cass, as Secretary of State (3 Wharton's International Law Digest, p. 65.)

In the third place, even as to the forfeiture of these private rights, no third person could take advantage of such alleged forfeiture collaterally until the same had been duly adjudged or declared by the department of the Government having jurisdiction for that purpose. It would be like a forfeiture dependent upon a failure of a condition subsequent, which all the authorities hold must be asserted and declared by the Government, if the grant be by the Government, before it can inure to the benefit of a third party. As to private property, no one save a grantor or his heirs can take advantage of a breach of a condition subsequent. Assigns can not do so, much less can a private party enforce a breach of such a condition existing only for the benefit of the Government.

It is clear that the only way in which the jurisdiction of the Government over this island could be divested would be, either by an abandonment and non-occupancy for such a period of time as would clearly show a purpose no longer to assert jurisdiction, or by an abandonment, accompanied by a declaration of such purpose, as suggested in section 5578.

Finally, I shall not attempt to maintain the proposition that the United States Government can by its courts or otherwise assert jurisdiction anywhere except in obedience to law; but the United States is a member of the commonwealth of civilized nations. It, with all other